STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
Court File No. C8-05-2727
Case Type: Other Civil
Honorable Mary Beth Dorn

Alec G. Olson and Butterworth Limited Partnership,

Plaintiffs,

v.

State of Minnesota, Matthew Kramer, Commissioner of the Minnesota Department of Employment and Economic Development and Daniel A. Salomone, Commissioner of the Minnesota Department of Revenue,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Minnesota Constitution contains two simple sentences which determine the outcome of the cross-motions for summary judgment: "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects . . . ." Minn. Const. Art. X, sec. 1. For exactly 100 years, these basic principles of fairness and the role of government have been the law in Minnesota. The legislation creating the Job Opportunity Building Zones (JOBZ Zones) and the Biotechnology and Health Sciences Industry Zones (Bioscience Zones) violates both these and other provisions of the Minnesota and United States Constitutions.

Fair taxation epitomizes the ru le of law, providing that people in similar economic circumstances receive similar treatment. At bottom, the Legislature has departed from the rule of law and entered into the realm of special treatment by allowing taxpayers to contract with the government to avoid paying their share of taxes .

Plaintiffs submit this Memorandum in support of their Motion for Summary Judgment. No material dispute exists with respect to any material fact which would preclude summary judgment pursuant to Rule 56 of the Minnesota Rules of Civil Procedure. Plaintiffs base this lawsuit squarely on constitutional issues.[1] The Legislature: (1) contracted away the taxing power, (2) surrendered the taxing power, (3) violated the Equal Protection Clause and 42 U.S.C. Section 1983, (4) violated the Uniformity Clause, (5) violated the special legislation prohibition and (6) violated substantive due process of law. Plaintiffs ask this court to uphold the concepts of uniformity and equal treatment in the taxation of businesses in Minnesota and declare these Programs unconstitutional.

I.

STATEMENT OF FACTS[2]

The JOBZ Program and the Bioscience Zone Program enacted by the 2003 Minnesota Legislature offer selected businesses credits against or exemptions from all major Minnesota business taxes--state corporate (and with the JOBZ Program individual) income tax, state and local

---

[1] Obviously, the policy considerations of the legislation are beyond the scope of this lawsuit:

> We are not concerned with the public policy involved in the imposition of such a tax. That responsibility is wholly with the Legislature within the constitutional limitations which the people of the state and nation have prescribed. Aside from such limitations, the only check on that branch of the government in the matter of taxation is its responsibility to its constituents. We are not concerned with the tax as a part of any social program, liberal or conservative, and this is not the place for our views as to the expediency, advisability, or economic justice or injustice of such a tax. We are concerned only with the sound interpretation of the Constitution of this state and of the United States. If we err in our construction of the latter, our views may be corrected by the Supreme Court. Our interpretation of our own Constitution is, of course, final.

Reed v. Bjornson, 191 Minn. 254, 257, 253 N.W. 102, 104 (1934) (upholding the Minnesota income tax against constitutional challenge).

[2] This statement of facts in intended to be the recital by the moving party of the material facts as to which there is no genuine dispute required by Rule 115.03(d)(3). The record consists of the stipulation with attached exhibits and the Affidavit of John James with attached exhibits.

sales tax, and state and local property tax (Stip. 1-2, 21-27). These benefits generally are labeled "exemptions."

The Programs were structured to operate in parallel fashion (Stip. 20, 27). The tax benefits under the Bioscience Zone Program in actual operation are quite different due to state budgetary concerns and 2005 legislative changes (Stip. 23-27). The Bioscience Zone Program is at issue for the $922,000 in tax exemptions already granted under it.[3] For purposes of simplicity, the Programs generally are referred to together, reflecting the parallel structure initially intended without repeated detailed explanations of the truncated nature of the Bioscience Zone Program.

A. The Programs and How a Business Qualifies

The Legislature created the Programs in 2003 during one of the special sessions that year. Omnibus Tax Act, First Sp. Sess., Ch. 21, Arts. 1 and 2, codified at Minn. Stat. 469A.310-.341 and amending Chapters 272 (taxation, general provisions), 290 (income and franchise taxes), 297A (general sales and use taxes) and 297B (sales tax on motor vehicles). In doing so, it delegated to thousands of local officials the discretion to provide 12-year exemptions from state and local taxes to selected businesses operating in geographic areas also determined at the discretion of local officials and DEED (Stip. 28, 39, 72-80, 82, 125). Minn. Stat. 469.311; 469.331. The long-term tax exemptions are granted by contract and apply to corporate franchise tax, state individual and corporate income tax, state and local sales and use taxes and state and local property taxes (Stip. 21-27, 38, 79-80, 121, 123; Exhibits S, T, DD, EE).

---

[3] The Legislature has also deployed the same operating pattern of 12 year state tax exemptions in yet another economic development program, the International Economic Development Zone Program, enacted in 2005 to commence in 2007, and modified in 2006 to commence in 2010. SeeMinn. Stat. 469.321-.328.

The principal criteria of business qualification for the JOBZ Program are the willingness to operate in a tax-free zone and an interest in starting a new business, expanding an existing business or relocating a business by moving into a new facility (Stip. 36-39). The Bioscience Zone Program is premised on the advantage to the bioscience industry businesses of locating near either the University of Minnesota or Mayo Clinic research facilities (Stip. 5, 94-96).

The Programs significantly decrease the corporate income tax burden of certain existing Minnesota businesses. Under the JOBZ Program, if a business chooses to expand in Minnesota, and if that business already has profitable operations in Minnesota, its Minnesota income taxes on such other operations are highly likely to be reduced. This is accomplished by a refundable jobs credit and/or by an exclusion of an amount of income determined by the percentage of property and payroll in the Zone as a percentage of total property and payroll in Minnesota (Stip. 21). Under the Bioscience Zone Program, if a business chooses to expand in Minnesota, and if that business already has profitable operations in Minnesota, its Minnesota income taxes on existing operations are also highly likely to be reduced. This is accomplished through a refundable jobs credit, a refundable research and development credit and/or by an exclusion of an amount of income determined by the percentage of property and payroll in the Zone as a percentage of total property and payroll in Minnesota (Stip. 23).

The Zones determined under the Programs are not meaningful because they could be anywhere and because Program administration occurs principally at the city or town level with each city or town responsible for identifying the various sub-zones (Stip. 68, 76-79, 82, 84, 87, 112, 116-18, 121). The sub-zones need not be contiguous (Stip. 32). The sub-zones do not require any special characteristics to warrant a public subsidy. They need not be blighted property, and they need not

contain a resource such as taconite which if removed and sold would provide great economic benefit to the state (Stip. 31-32, 34-36, 45-47, 52-62, 90-93, 101-103, 105-111). If the business would prefer not to locate in an already designated tax free sub-zone, the tax free sub-zone can be brought to the business (Stip. 71, 114, Exhibit N, BB). In other words, the sub-zones can be a patchwork of existing businesses, operating next to businesses that are obligated to pay their full share of state taxes.

In each Program, the benefits flow to any "qualifying business," defined as follows. First, a business must meet certain minimal characteristics. In the JOBZ Program, any business other than a retail store or a public utility is eligible for consideration (Stip. 36-39) Minn. Stat. 469.310, subd. 11. In the Bioscience Zone Program, a business must either operate in the biotechnology industry, liberally defined, or receive more than 50 percent of its gross receipts from "promoting, supplying or servicing" the biotechnology industry (Stip. 94-96). Minn. Stat. 469.330, subd. 11. Second, each Program requires that a business be willing to operate in a tax-free or reduced tax zone, a qualification remarkably easy to meet. The ability of local officials to bring the tax-free zone to the business creates the potential to have JOBZ Program beneficiaries anywhere in the 325 cities and towns in which sub-zones have been established, probably anywhere in the 78 counties which have land in a JOBZ Zone, and potentially anywhere in Sherburne and Wright Counties which qualify for the JOBZ Program but have no land in a JOBZ Zone (Stip. 32, 66). In the Bioscience Zone Program, the business can be located anywhere in Minneapolis, Rochester or St. Paul (Stip. 106, 112).

If these two criteria are met, a business must meet one of the following five business characteristics to qualify:

(1) a start-up business, or

(2) a start-up facility in Minnesota of a business that previously only operated out of state, or

(3) a facility expanding from some other Minnesota location, provided that the new facility not "replace or supplant an existing operation or employment, in whole or in part," or

(4) a facility relocating from some other Minnesota location, provided that it (a) "ceases one or more operations or functions at another location in Minnesota and begins performing substantially the same operations or functions in a [Zone],"or (b) "reduces employment at another location in Minnesota during a period starting one year before and ending one year after it begins operations in a [Zone] and its employees in the [Zone] are engaged in the same line of business as the employees at the location where it reduced employment," and (c) in either case, "increases full-time employment in the first full year of operation within the [Zone] by at least 20 percent measured relative to the operations that were relocated and maintains the required level of employment for each year the zone designation applies,"[4] or

(5) a facility relocating from some other Minnesota location, provided that it "makes a capital investment in the property located within a zone equivalent to ten percent of the gross revenues of operations that were relocated in the immediately preceding taxable year"[5] (Stip. 36-39). Minn. Stat. 469.310, subds. 11 (a) (b) and 12 (a) (b); Minn. Stat. 469.330, subds. 11 (a) (b) and 12 (a) (b).

---

[4]The Legislature tightened the JOBZ Program in 2005 to require the greater of 20 percent as quoted or five jobs for deals entered into after July 14, 2005, but simultaneously loosened it by giving the DEED Commissioner discretion to waive the employment requirement altogether if the Commissioner "determines that the qualified business will substantially achieve the factors under this subdivision." The 2005 change also added a requirement that compensation be at a rate at least equal to 110 percent of the federal poverty level for a family of four (Stip. 37-40).

[5]The 2005 legislature repealed the ability to qualify under the JOBZ Program based on capital investment, effective for deals signed after July 14, 2005. Minn. Laws 2005, 1st Sp. ch. 1, art. 4, sec. 107.

The fifth criterion permitted businesses that signed deals before July 15, 2005, to qualify simply by building a new facility, without regard to whether jobs were gained, lost or stayed the same. Thus, a business could construct a building with the cost offset by a reduction of state and local taxes through 2015 (Stip. 37-40).

Prior to July 15, 2005, the fourth criterion was fairly easily met by very small businesses which were looking to expand. For example, if a business employed less than five persons, it could qualify for the JOBZ Program by relocating and adding one additional employee. A phenomenal number of businesses could qualify under one or more of these five criteria before the 2005 legislation, and substantial numbers still can. Moreover, the DEED Commissioner now has virtually unfettered discretion to waive the job increase requirement (Stip. 37-40).

The businesses selected to benefit under the Programs do not have to be engaged in producing a product which will contribute to the public infrastructure and provide benefits to the general public such as cars for light rail. Their product could be fur coats or firecrackers (Stip. 36). The Programs simply embody the common hope that the favored businesses will provide jobs, exactly what the other un-favored 178,000 Minnesota businesses do, while paying the full panoply of taxes imposed upon them by the Legislature (Stip. 4, 139).

The Programs reduce tax revenues that would otherwise be payable to state and local governments. This increases the burdens on Plaintiffs and other taxpayers by making it more difficult for those governments to provide needed services and support the very economic development which the Programs are intended to promote.

Long-term tax exemptions are valuable economic benefits to businesses. Tax exemptions are in some ways more valuable than cash because they are off-budget, less visible and exempt from

the legislative appropriations process gauntlet. In addition, the favored businesses are spared the need to continue justifying the subsidy because they have it by contract until 2015.

The Legislature and DEED intended that the Programs would involve millions of dollars (Stip. 6; Exhibits A and B). The tax exemptions under the JOBZ Program have no caps (Stip. 22). The caps on the Bioscience Zone Program tax exemptions came from budgetary necessity with the hope that the caps be reduced or removed when the budget crisis of 2003 ends (Stip. 6, 99; Exhibit B). In theory, the Programs could exempt thousands of businesses from the burden of state taxes.

B. Results of the Programs.

DEED provides data and information about both completed and attempted deals (Exhibits U and FF). From the information in Exhibit U, Plaintiffs created four charts:

Exhibit 1	JOBZ deals by zone and county
Exhibit 2	JOBZ deals by city
Exhibit 3	Number of jobs projected by DEED
Exhibit 4	24 largest deals and jobs projected by DEED

Plaintiffs also submit two additional exhibits from Exhibit U with comparative economic and demographic data:

Exhibit 5	Comparative income and population by county
Exhibit 6	JOBZ deals by county ranked by income and population

To date, 228 deals have been completed--220 under the JOBZ Program and eight under the Bioscience Zone Program (Stip. 81, 124; Exhibits U and FF) The JOBZ deals include one Holiday Inn, five welding operations, four cabinet companies, one waste disposal company, one medical bill collector, 14 building material suppliers, one tire-shredding company, one baler-twine manufacturer,

one sign and billboard company, two John Deere dealerships, one firm of architects, one maker of dental crowns and bridges, and a variety of other manufacturing, distribution, transportation, and service businesses (Exhibit U). Fourteen businesses have received tax exemptions under the Programs despite not projecting the creation of any new jobs (Id.).

The vast majority of the deals done to date are small. Exhibit 3 demonstrates that 150 of the 220 JOBZ deals project less than ten jobs. A much smaller number of deals involve businesses with clearly multi-state markets or that might have considered locating in another state due to their near border location and the nature of the business.

Numerous deals, some large, some small, involve businesses that work with materials produced in Minnesota such as corn, soybeans, peat, timber, rocks and wind (Exhibit U). These projects are inherently likely to be destined for Minnesota even without the Programs, but they certainly are given an advantage by the Program over other Minnesota businesses in the same line of business. There are at least 17 such deals for which DEED projects 533 new jobs (Stip. 50; Exhibit U).

Eleven percent (24 of 220) of the total deals to date account for more than 50 percent (1,680 of 3,072) of the total projected jobs from the JOBZ Program to date (Exhibits 3 and 4). Of the 24 largest deals, five deals and 314 projected jobs are expansions of existing Minnesota facilities. Nine deals and 618 projected jobs involve relocations within Minnesota. Four deals and 193 projected jobs involve new operations of Minnesota businesses. Four deals and 365 projected jobs involve processing Minnesota materials. Only two of the largest 24 deals (Total Card and Wenonah Canoe) and 190 projected jobs result from out-of-state businesses with no nexus to Minnesota raw materials relocating to this state (Exhibit 4).

DEED categorizes 48 of the JOBZ deals as being with new businesses and nine as being relocations or expansions from out of state (Exhibit U). These 57 businesses are exempt from all major Minnesota state and local taxes through 2015 (Stip. 21). The remaining 163 JOBZ deals involve at least partial exemption from state and local property taxes through 2015, complete exemption from state and local sales taxes through 2015 for purchases to be primarily used in the zone, and potential exemptions and credits against the corporate and individual income taxes through 2015, depending on the extent of Minnesota operations within and outside the Zone (Stip. 21, 22).

A few cities have garnered a substantial number of the JOBZ deals, led by Albert Lea with nine, Little Falls with eight and Fergus Falls with seven. Fifty cities with two or more deals account for 157 of the 220 deals. Sixty-three cities have one JOBZ deal. Of the 325 cities and towns with JOBZ sub-zones, 212 have no deals (Exhibit 2).

Review of the JOBZ Program, its results to date and the Minnesota economy demonstrates that the JOBZ Program has the potential to grow greatly in the years ahead. The JOBZ Program invites every non-retail business in greater Minnesota to seek tax exemption for expansion. The concentration of JOBZ deals in a relatively few cities suggests that some economic development officials are more aggressively pushing JOBZ (Stip. 83). If all 325 cities and towns participate at the level attained in just two years by Albert Lea, 3,000 Minnesota businesses will be partially or entirely exempt from state and local taxation through 2015.

Exhibits 5 and 6 show that the distribution of JOBZ deals among the lower, middle and upper third of counties in terms of prosperity was as follows:

	Deals	%	Projected Jobs	%
Lower	80	36.4	672	20.5
Middle	71	32.3	1,343	41.1
Upper	69	31.3	1,255	38.4
Total	220	100.0	3,270	100.0

The State Economist and State Demographer identify 17 counties within the Twin Cities Metro Area (excluding the Wisconsin counties that are also part of the economic Twin Cities) which they identify as the Metroplex (Exhibit 7). The JOBZ Program bars the location of JOBZ Zones in any of the seven statutory Metro Area counties, and two more counties (Sherburne and Wright) chose not to be part of a JOBZ Zone (Stip. 66). Two others (Benton and Isanti) have no JOBZ deals yet. The remaining six eligible Metroplex counties account for 16 percent of the JOBZ deals and 27 percent of the projected JOBZ jobs (Exhibit 1). They are:

JOBZ DEALS BY COUNTY

	Deals	Projected Jobs
Stearns	15	188
Chisago	2	278
McLeod	6	81
Rice	3	97
Goodhue	4	69
Olmsted	6	161
Total	36	874

The prosperity rankings of the Metroplex counties outside the seven largest metro counties ranges from fifth to 23rd among Minnesota's 87 counties (Exhibit 5). All are comfortably within the top third of Minnesota counties in economic prosperity.

The JOBZ Program experience to date demonstrates that the more prosperous counties garner larger job growth. Eight of the 29 counties in the lower third by prosperity have no JOBZ deals to

date. In total projected jobs, the 29 counties in the lower third have 20.5 percent, the 28 eligible counties in the middle third have 41.1 percent and the 21 eligible counties in the upper third have 38.4 percent (Exhibits 5 and 6).

By contrast, 80 percent of the applicants for the Bioscience Zone Program tax exemptions abandoned the process in midstream, perhaps due to the fact that the state tax benefits (other than property tax) ran only through 2005 and that local governments chose not to provide local property tax benefits (Stip. 119). In the Bioscience Zone Program local property tax benefits were granted only if the local governing board approves. The state tax benefits apply without regard to local approval (Stip. 23). Olmsted County is the only local government to approve local property tax benefits, while Minneapolis, Hennepin County, St. Paul, Ramsey County and Rochester refused to provide local property tax exemptions (Stip. 118).

The 228 profit-seeking enterprises that are the Program beneficiaries to date are not unique in their entrepreneurial endeavors. Thousands of other Minnesota individuals, partnerships, LLCs, and corporations are engaged in every one of the enterprises found in the list of Program beneficiaries. Those entities are not relieved of the income, sales and property tax burdens that arise out of doing business.

Nor do the beneficiaries of the Programs represent an influx of new jobs from out-of-state. DEED identifies only eight of the 220 JOBZ beneficiaries as relocating from outside Minnesota (Exhibit U).

Plaintiff Olson is Minnesota resident, homeowner and taxpayer who lives in Spicer. He pays local property taxes, state sales tax and individual income tax in Minnesota. Plaintiff Butterfield Limited Partnership is a Minnesota limited partnership which owns and operates a non-retail

business in Bloomington which pays local property taxes and state sales tax in Minnesota. Its individual partner, William Halverstadt, lives in Corcoran and pays individual income tax on his distributive shares of the income from Butterfield Limited Partnership (Stip. 9-11).

II.

LEGAL ISSUES

A. Do the JOBZ Program and the Bioscience Zone Program violate the Minnesota constitutional ban against contracting away the power of taxation?

B. Do the JOBZ Program and the Bioscience Zone Program violate the Minnesota constitutional ban against surrender of the power of taxation?

C. Do the JOBZ Program and the Bioscience Zone Program violate Plaintiffs' rights to equal protection of the law, the Uniformity Clause and the Special Legislation Clause?

D. Do the JOBZ Program and the Bioscience Zone Program violate Plaintiffs' rights to substantive due process of law guaranteed under the United States Constitution?

III.

LEGAL ARGUMENT

The JOBZ and Bioscience Zone Programs violate the express Minnesota constitutional ban created by the Wide-Open Tax Amendment of 1906 which states: "The power of taxation shall never be surrendered, suspended or contracted away. Taxes shall be uniform upon the same class of subjects . . . . " Minn. Const. Art. X, sec. 1. This constitutional provision is not some outmoded relic of the past which courts are free to ignore or morph to meaninglessness. For as long as the

government exerts its right to tax the citizenry, the Legislature must abide by the Constitution--all of it.

The Legislature's abdication of its power to tax to local discretionary decision-making also violates those constitutional provisions which prohibit irrational discrimination: the Equal Protection Clauses of the Minnesota and United States Constitutions, and the Uniformity Clause and the Special Legislation Clause of the Minnesota Constitution.

The profound irrationality of the Programs as economic development tools violates substantive due process because they are not rationally related to the achievement of economic development. And even if the Programs do meet the very low standard to avoid a substantive due process violation, the various irrational attributes of the Programs lead to the conclusion that the classifications are irrational and violate the Uniformity, Equal Protection and Special Legislation Clause.

Plaintiffs acknowledge that legislative acts enjoy a presumption of constitutionality. In re Haggerty, 448 N.W.2d 363, 364 (1989). But the legislature or the courts "may not stretch the Constitution to suit the convenience of the hour." Reed v. Bjornson, 191 Minn. 254, 257, 253 N.W.2d 102, 104 (1934). An act may be declared unconstitutional if it cannot reasonably be construed in a way that comports with a provision in the state or federal constitution. State v. Seuss, 236 Minn. 174, 181, 52 N.W.2d 409, 414 (1952). Constitutional provisions limit the legislature's power of taxation. Reed, 191 Minn. at 258, 253 N.W. at 104. In this case Plaintiffs meet their burden and establish beyond a reasonable doubt that the statutes that created the Programs violate a constitutional provision. Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988).

No material dispute exists with respect to any material fact which would preclude summary judgment pursuant to Rule 56 of the Minnesota Rules of Civil Procedure. Plaintiffs base this lawsuit squarely on constitutional issues. The Legislature: (1) contracted away the taxing power, (2) surrendered the taxing power, (3) violated the Equal Protection Clause and 42 U.S.C. Section 1983, (4) violated the Uniformity Clause, (5) violated the special legislation prohibition and (6) violated substantive due process of law.[6]

A. The Programs Violate the Minnesota Constitutional Ban Against Contracting Away the Power of Taxation.

In November 1906, Minnesota voters, by a vote of 156,051 to 46,982, ratified the Wide-Open Tax Amendment, so named because it removed all restrictions on the Legislature's power of taxation except for the requirement that taxes be uniform on the same class of subjects. Tax Study Commission, History of Taxation in Minnesota 12 (1979). The first sentence of the Wide-Open Tax Amendment reads: "The power of taxation shall never be surrendered, suspended or contracted away." Minn. Const. Art. X, sec.1.

Prior to 1906, Minnesota had a history of doing that very thing--contracting away its power to tax to the railroad companies. Later, the Legislature raised railroad taxes. Railroad companies sued the state in response, arguing that the increase violated the legislative charters in which the Legislature contracted away its power to tax. The dispute reached the United States Supreme Court.

The railroads won in Stearns v. State of Minnesota, 179 U.S. 223 (1900), where the United States Supreme Court struck down an 1895 Minnesota statute that imposed the property tax on lands

---

[6] Minn. Stat. 15.472 authorizes this court to grant Plaintiffs reasonable attorney fees if Plaintiffs prevail and the court determines that the state's position was not substantially justified. Plaintiffs seek an award of attorney fees pursuant to this statute and 42 U.S.C. 1988.

owned by the railroads but not used for railroad purposes. The court determined that Minnesota had contracted away its power to increase railroad taxes, and that having done so, it was barred by the Contract Clause from imposing this new and additional tax on the railroads.

The more reform-minded 1901 Legislature found this result untenable and created a Tax Commission. The Tax Commission's report concluded that "[p]ublic interests would undoubtedly be best guarded under a constitution which divests a legislature of the power of entering in a contract with respect to taxation." 1902 Report of the Tax Commission, created by Laws 1901, chapter 13, for the Purpose of Framing a Tax Code at 53 (The Pioneer Press Company 1902).

The Legislature responded to the report by proposing the Wide-Open Tax Amendment in 1905, and the people overwhelmingly approved it in 1906. Thus, the 1902 Tax Commission, the 1905 Minnesota Legislature, and Minnesota's voters in 1906 all agreed that Minnesota should not be burned again by the practice of giving or contracting away the sovereign power to tax. This year is the 100th anniversary of the Wide-Open Tax Amendment. It remains in the Minnesota Constitution, unaltered to this date.

In each of the JOBZ Zones and Bioscience Zone deals, the government signs an agreement which "contract[s] away" its "power of taxation." The contracts give tax breaks to selected businesses until December 31, 2015.[7] But the mandate of the simple admonition of the Constitution that "the power of taxation shall never be surrendered, suspended or contracted away" is clear:

> The broad, all-comprehensive language . . . leaves no doubt that it was intended to prevent any impairment of the taxing power in any manner whatever. . . . The plain language of article X, s. 1 forbids the state to contract away the power to tax. It

[7] Only potentially for the Bioscience Zone Program unless the Legislature funds the exemptions in future years (Stip. 25-27).

> would thus have been *ultra vires* for [the state] to grant to appellants a permanent tax exclusion as a contractual right.

Anderson v. State, 435 N.W.2d 74, 77 (Minn. App. 1989) (italics in original).

In 1963 the Legislature wanted to induce investment in the taconite industry by guarantying the industry that it would enjoy advantageous tax rates for 25 years. Both the steel industry executives and the Legislature knew that they could not, by own their agreement, make a deal that would contract away the power of taxation. Therefore, they proposed a constitutional amendment which would override the Wide-Open Tax Amendment. The people approved the amendment which states: "Laws of Minnesota 1963, Chapter 81, relating to the taxation of taconite . . . shall not be repealed, modified or amended, nor shall any laws in conflict therewith be valid until November 4, 1989." Minn. Const. Art. X, sec. 6. Such subtleties as the Minnesota Constitution were lost on the 2003 Legislature which presumes that if contracts the power of taxation away one little part at a time, it can ignore the constitutional prohibition.

When a business enters either Program, the business must sign an agreement with the local officials who administer the Program. DEED urges, but does not require, that the agreement use its form, called the Model JOBZ Business Subsidy Agreement (Stip. 79-80; Exhibits S and T). The agreement specifies the tax benefits and exemptions which the business receives in consideration of its promises to achieve certain employment goals. The agreement concludes with the following language: "This agreement shall be binding upon any successors or assigns of the parties. . . . [T]he subzone administrator and the qualified business have acknowledged their assent to this agreement and agree to be bound by its terms through the signatures entered below" (Exhibit S).

So far, the state has contracted away the power to tax 228 times. This practice and the statutes that authorize it are, therefore, unconstitutional, the purported contracts void and the tax exemptions retroactively eliminated. State v. Great Northern Ry. Co., 106 Minn. 303, 330, 119 N.W. 202, 208 (1908) ("The Legislature of the state was prohibited by the express mandate of the Constitution from granting such an immunity. All statutes, therefore, by which an attempt was made to confer the immunity upon defendant's predecessors in interest were unconstitutional and void."), affirmed sub nom, Great Northern Ry. Co. v. Minnesota, 216 U.S. 206 (1910).[8] Those who benefit from these contracts have no Taconite Amendment to protect their favored treatment.

Relevant to the relief appropriate in this case is the inclusion of the word "suspended" in the Wide-Open Tax Amendment. If the JOBZ contracts are voided, but not held to be void *ab initio,* the legislature will be left free, notwithstanding the Constitution, to pass out unconstitutional tax exemptions in the future knowing the exemptions will be effective until an action is commenced and a court declares them invalid. But the beneficiaries will have had their taxes suspended until the court rules. The relief from this court must go back to the beginning of the exemption period to avoid suspending the power of taxation and to avoid benefits being realized from illegal contracts -- in this case and in the future.

---

[8]This was another important Minnesota railroad contracting away case to reach the United States Supreme Court. In 1903, the Legislature increased the railroad gross receipts tax from the three percent specified in railroad charters to four percent effective in 1905 and thereafter. At least some railroads refused to pay the extra percent on the ground that the Contract Clause protected them against the tax increase, so the state sued them to collect. Both the Minnesota Supreme Court, and the United States Supreme Court upheld the constitutionality of this tax change, but the outcome was in doubt from 1903 until 1910.

B. The Programs Violate the Minnesota Constitutional Ban Against Surrender of the Power of Taxation.

"The power of taxation shall never be surrendered . . . ." Minn. Const. Art. X, sec. 1. By enacting the Programs, the Minnesota Legislature surrendered the taxing power to thousands of local officials, violating this explicit constitutional mandate. Under Minnesota's form of government, taxation is a legislative power, and only the Minnesota Legislature embodies the statewide concerns that go into the decision of how the power of taxation should be exercised. Reed v. Bjornson, 191 Minn. 254, 253 N.W. 102 (1934). The Legislature's delegation of authority to local officials demonstrates the deliberate abandonment of this rule of law.[9] "It is elementary that the power of taxation is inherent in sovereignty and under our system of government reposes in the Legislature, except as it is limited by the state or national Constitution." Id. at 257-58, 253 N.W. at 104. When it created the JOBZ Program, the Legislature explicitly gave hundreds of local governments across the state authority to: (1) propose whatever they wanted for tax-free zones with the DEED Commissioner to decide with no meaningful standards for review which areas will be tax-free, and (2) decide in virtually unfettered discretion which businesses intent on expansion and willing to expand in Minnesota would and would not receive long-term state tax exemptions, including the power to bring the zone to the business if the business does not want to come to an already established zone.

This extraordinarily broad delegation of authority allows local officials to decide which businesses will benefit. They can favor their friends or do whatever else they please, with the potential to exclude numerous equally qualified businesses for no discernible reason beyond the

---

9 The JOBZ Program is exempt from the Administrative Procedures Act (Stip. 44). Minn. Stat. 469.314, subd. 7.

discretion of the local decision-maker. This local discretion is enhanced by the ease of qualification for businesses and the breadth of the principal criterion which provide no meaningful guidance regarding which businesses should benefit. No way exists to test the veracity of the claim that the exemptions are crucial to a location decision or whether jobs would have been created anyway and the large intended magnitude of the exemptions.

The legislative abdication is all the more stunning because there is nothing special about the land involved. The Programs' ancestors were urban renewal programs involving specifically identified areas with major problems. In the JOBZ Program, the land could be almost anywhere outside the seven-county Metro Area. In the Bioscience Zone Program, the land is more constrained but still is not particularly special. These programs are really not about problem areas at all, but about giving state and local economic development officials the power to hand out subsidies, and encouraging businesses to pursue these handouts. This is tax relief by contract featuring public officials handing out long-term tax exemptions, without regard to their long-term effect on the state.

In Wallace v. Commissioner, 289 Minn. 220, 184 N.W.2d 588 (1971), the Minnesota Supreme Court struck down an attempt by the Legislature to automatically amend the state income tax law to conform with subsequent changes made by the United States Congress to the federal Internal Revenue Code:

> [T]he principle which controls is that a state legislature may not delegate its legislative powers to any outside agency, including the Congress of the United States. The reason for this rule is that changes in the foreign legislation may not fit the policy of the incorporating legislature and the person subjected to the changed law would be denied the benefit of the considered judgment of his legislature on the matter. The basic objection derives from the principle that laws should be made by elected representatives of the people responsible to the electorate for their acts. That principle is expressed in [the Minnesota Constitution] which states in part: 'The power of taxation shall never be surrendered, suspended or contracted away.'

Id. at 226, 184 N.W.2d at 591. The Legislature has now delegated powers to outside agencies consisting of the hundreds of sub-zone administrators empowered by DEED and the local governments that approve individual exemptions. Under the Programs, the decisions of local officials tie the hands of the Legislature in the taxation of 228 businesses through 2015. By stark contrast, in Wallace the Legislature's hands were not tied at all; yet Wallace was an unconstitutional surrender of the taxing power.

The granting of state tax exemptions by local officials to businesses that they decide in their discretion to favor deprives Plaintiffs of the "considered judgment" of "elected representatives of the people responsible to the electorate for their acts." Id. These programs are taxation without representation for all Minnesota taxpayers except the favored businesses determined by local officials. They are inconsistent with Wallace and a surrender of the taxing power by the Minnesota Legislature, in which the Minnesota Supreme Court long ago declared that it reposes. Reed v. Bjornson, supra. Because the power of taxation is inherent in sovereignty, the Legislature must retain the ability to make whatever tax changes it deems advisable at any time. In enacting the Programs, the Legislature purported to divest itself of the sovereign power of taxation by allowing local officials to decide who would be exempt. This it cannot do. These programs must therefore be declared unconstitutional and the tax benefits purportedly granted must be ended retroactively. State v. Great Northern Ry. Co., supra. See also City of Tacoma v. Tax Commission, 33 P.2d 899 (Wash. 1934) (expressing the general principle that local governmental units cannot contract away the state's taxing power). Cf. Little Falls Electric & Water Co. v. City of Little Falls, 74 Minn. 197, 77 N.W. 40 (1898) (holding that the Legislature could not grant to a city the authority to make a contract to accept services in lieu of taxation of property).

C. The Programs Violate Plaintiffs' Rights to Equal Protection of the Laws, the Uniformity Clause and the Special Legislation Clause.

Three separate provisions of the Minnesota Constitution and one provision of the United States Constitution command that the Legislature make no irrational discrimination among citizens when imposing tax obligations. After observing legislatures in state after state yield during the late nineteenth century to the temptation to play favorites, the writers of our Constitution included three provisions against favoritism. Two of the provisions are specifically directed against tax favors.

The Minnesota Supreme Court construes the scope of protection afforded to persons to be identical under the Minnesota guarantee of equal protection ("No member of this state shall be disfranchised or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. Art. I, sec. 2), the Federal Equal Protection Clause and the Minnesota Tax Uniformity Clause ("Taxes shall be uniform upon the same class of subjects." Minn. Const. Art. X, sec. 1). ILHC of Eagan, LLC v. County of Dakota, 693 N.W.2d 412, 421-22 (Minn. 2005). Interpreting each of these constitutional provisions, the Supreme Court adopted a three-part test in Miller Brewing Co. v. State, 284 N.W.2d 353, 356 (Minn. 1979):

> The test to determine the constitutionality of statutory classifications includes three primary elements: (1) the distinction which separates those included within the classifications from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedies; and (3) the purpose of this statute must be one that the state can legitimately attempt to achieve.

The Programs at issue fail this test.

1. Equal Protection

Both the Minnesota Constitution and the United States Constitution guarantee that all citizens are entitled to equal protection under the law. The Miller Brewing test requires that rational classifications separate benefitted persons from those who do not enjoy the benefit. Implicit in the test is this: some classification must exist. If no classification exists, the differences in how persons are treated are inherently arbitrary, irrational and unconstitutional.

No rational or discernable classification exists in the JOBZ program, either in the legislation or in its implementation. Beneficiary businesses may be--and are--large or small, new or old. They may be wedded to location or free to move anywhere, relocating or staying put. They may be expanding or not expanding, thriving or struggling, on prime real estate or marginal property, in new buildings or old. They may be in regional centers or rural communities, in incorporated cities or in towns. They may be organized as C corporations or S corporations or LLCs or partnerships or sole proprietorships. They may be engaged in manufacturing or distribution or transportation or material processing. Or they may provide services.

Some print shops are in; most are out. Some ready-mix companies are in; most are out. One poultry processor is in; all others are out. Some window makers are in; some are out. Some cabinet makers are in; most are out. One architectural firm is in; all others are out. Some welding shops are in; most are out. Some distribution facilities are in; most are out. Some bioscience businesses are in; most are out.

The benefitted ones are those that operate in Zones. But there is absolutely nothing special about the land in the Zones. The land is so un-special and its qualities so irrelevant that the Zone can be brought to the business (Stip. 71, 114; Exhibits N and BB).

The JOBZ statute includes not one word purporting to be a classification, although it does recite a few vague prerequisites for being considered. Under the legislation, a business does not qualify for JOBZ; it qualifies to be considered. Any existing business can qualify for consideration if it is willing to represent that, with the JOBZ subsidy, it will increase its workforce by at least one new employee. All new businesses qualify, as do many that move. The legislation disqualifies very few businesses.

The Bioscience Zone Program covers science-related businesses, including those businesses that merely supply science-related businesses (Stip. 95). It benefits only those selected by local officials of Minneapolis, St. Paul, or Rochester, just as the JOBZ tax exemption goes only to those qualified businesses that are selected by local officials.

Selection by local officials, acting without statutory limitations on their discretion, does not protect against unconstitutional inequality. Indeed, it is the very essence of unconstitutional inequality. It does not satisfy the classification requirements of equal protection as set out in Miller Brewing.

That the task of discrimination is delegated to local officials does not save the Programs. They still discriminate against the approximately 178,000 other businesses that must pay taxes (Stip. 139). And the Programs discriminate against every individual taxpayer who must pay more taxes because of the benefits enjoyed by a few hundred businesses and individuals.

A business chosen to participate may have competitors. Some of these competitors may be willing to operate in a Zone. In every such case, the selection of a business to operate in a Zone and exclusion of other willing competitors is manifestly arbitrary. Even if no competitor is willing to operate in a Zone, the lack of any distinctive characteristics of the Zone property warranting a

subsidy for operation there renders the distinctions between businesses operating in a Zone and all other locations arbitrary.

Minnesota has crossed a line with the JOBZ and Bioscience Zone Programs--moving from subsidizing investments that brought activity to particular parcels of otherwise distressed real property, or from subsidizing activities that promised great spillover public benefits, such as creation of a transportation network, or the realization of benefits from mining taconite, to just subsidizing the provision of jobs or the construction of new facilities. Because all businesses provide jobs and most will provide more if they prosper, and all businesses operate in facilities and most would appreciate having a new one, there is no rational basis for singling out only a few favored businesses for economic help just because they too will provide jobs if they prosper.

The bottom line is simple: the JOBZ and Bioscience Zone Programs make sense if the only way to provide jobs for Minnesotans is to provide long-term tax exemptions to their prospective employers. But if that is the case, it applies equally to all businesses. Thus, the distinction between the favored few and the thousands of other Minnesota businesses is manifestly arbitrary and fanciful, and completely irrational.

The JOBZ and Bioscience Zone Programs lack any classifications and are therefore irrational. This plainly fails to satisfy two of the three Miller Brewing tests because of the complete absence of distinctive or peculiar needs or conditions. Consequently, these programs violate the Equal Protection Clauses. In Dalton Realty, Inc. v. State, 270 Minn. 1, 132 N.W.2d 394 (1964), the court used the Uniformity Clause and the Equal Protection Clause to strike down the systematically discriminatory assessment practices then in effect. Dalton differs from this case in that the discrimination was held also to be barred by statute, whereas here the Legislature intended the

discrimination. But the Constitution trumps any statute, and the local discretion evidenced in Dalton is exactly what happens under the JOBZ and Bioscience Zone Programs. Local discretion to discriminate was unconstitutional in 1964 in Dalton, and it remains unconstitutional in 2006 in the JOBZ and Bioscience Zone Programs. See also Little Falls Electric & Water Co. v. City of Little Falls, 74 Minn. 197, 77 N.W. 40 (1898) (exempting the property of a company from taxation in a contract for services violated the predecessor of the Uniformity Clause which required uniformity and equality of taxation).

The same conclusion follows from United States Supreme Court precedents. In Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 488 U.S. 336 (1989), the Webster County tax assessor valued petitioners' real property on the basis of its recent purchase price, but made only minor modifications in the assessments of property which had not been recently sold. "This practice resulted in gross disparities in the assessed value of generally comparable property, and we hold that it denied petitioners the equal protection of the laws guaranteed to them by the Fourteenth Amendment." Id. at 338. Here, there are gross disparities in the taxation of Plaintiffs and the program beneficiaries, gross disparities in their respective subjection to the legislative budgetary and tax gauntlet, and gross disparities in the taxation of program beneficiaries and their competitors, all at the discretion of local officials, just as in Allegheny Pittsburgh Coal. The conclusion there necessarily follows here.

In Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Williams v. Vermont, 472 U.S. 14 (1985); and Zobel v. Williams, 457 U.S. 55 (1982), the court invalidated state statutes that mandated discrimination against new residents in favor of pre-existing residents. That the opposite occurs here--discrimination against existing residents and businesses in favor of new or expanding

businesses---does not change the problem of discrimination where, as here, there is no rational basis for it.

In Metropolitan Life Insurance Company v. Ward, 470 U.S. 869, 880 (1985), the court held "that promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." Here, the discrimination is against local businesses that wish to compete. The consistent problem is favoritism in favor of some persons and against similarly situated persons. Here, because the Programs do not address specific, limited problems, such as specific impaired real property or specific needs of the state, or a railroad to be built or taconite to be mined or a sports stadium to be occupied, but are aimed solely at producing jobs, which is what all businesses do, the favoritism of the beneficiary businesses chosen at local officials' discretion is not a legitimate state purpose. It is not a legitimate state purpose to favor one business over others based only on the hope that jobs will be provided, for the simple reason that all businesses provide jobs.

Because the JOBZ and Bioscience Zone Programs violate the Equal Protection Clause, the exemptions from taxation they provide are invalid *ab initio* and the tax benefits must be forfeited. In addition, Plaintiffs are entitled to reasonable attorney fees. Those portions of Plaintiffs' claims which allege a violation of the Fourteenth Amendment to the United States Constitution also allege a cause of action pursuant to 42 U.S.C. 1983. The "prime focus" of section 1983 is to ensure "a right to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 (1979). Section 1983 "provides a remedy, to be broadly construed, against all forms of official violation of federally

protected rights" Monell v. New York City Dept. of Social Services, 436 U.S. 658, 700-01 (1978). Thus, deprivation of equal protection or due process violates section 1983.

This court has authority to award attorney fees to Plaintiffs if Plaintiffs prevail on their section 1983 claim. 42 U.S.C. 1988. The purpose behind section 1988 and its authorization of attorney fees is to encourage private enforcement actions such as this and deter violations of civil rights. Rajender v. University of Minnesota, 546 F. Supp 158, 163 (D. Minn. 1982). Following a generous and flexible standard, this court should order attorney fees if Plaintiffs prevail on any significant issue. Texas State Teachers Ass'n v. Garland Independent School Dist., 489 U.S. 782, 793 (1989); accord, Swart v. Scott County, 650 F. Supp. 888, 891 (D. Minn. 1987)

2. "Taxes Shall Be Uniform On the Same Class of Subjects"

The clause "[t]axes shall be uniform on the same class of subjects . . . .", part of the Wide-Open Tax Amendment of 1906, is now in the second sentence of Article X, Section 1, of the Minnesota Constitution.

The difference between the JOBZ Program and tax increment financing is revealing on the issue of uniformity. The beneficiaries of tax increment financing do not receive tax breaks. They pay the same property taxes as other property owners. The subsidy, if any, they receive comes through reduced land acquisition costs. The taxes they pay are, for a number of years, diverted from the general support of government and dedicated, instead, to paying off the costs the public incurred in providing land acquisition subsidies and public infrastructure with public benefits in the surrounding area. The subsidy is on the spending side, not the taxing side. Uniformity of tax obligation is preserved.

Because the test under the Uniformity Clause is the same as under the Equal Protection Clause, the above argument applies. But the existence of this unambiguous imperative clause demonstrates the special concern the Minnesota Constitution shows for fairness in taxation. Do the beneficiaries of the JOBZ and Bioscience Zone Programs constitute a class distinguishable from the tens of thousands of other enterprises doing business and paying taxes in the state of Minnesota? Is there a rational basis for treating businesses that do not enjoy the tax exemptions provided by the JOBZ and Bioscience Zone Programs differently, and less favorably, then the JOBZ and Bioscience Zone Program beneficiaries? Clearly not.

It is revealing that the beneficiaries of the JOBZ and Bioscience Zone Programs are nowhere defined in the legislation. They are simply selected by local officials. Those local officials decide who will enjoy the benefit of the JOBZ and Bioscience Zone Programs.

Independent of its importance for basic fairness, uniformity of tax burden has practical implications. Uniformity is more vital for the personal and corporate income taxes than it is for any other government program because voluntary compliance is essential for the income tax to work efficiently. And that efficiency, more than anything else, produces the revenue necessary to operate the three branches of our state government and to pay the state aids so essential to schools and local governments.

Voluntary compliance rests largely on a sense among citizens and businesses that they are being treated fairly. But that sense of fairness is undermined by the following two paragraphs from page 12 of the 2005 instructions for Minnesota's personal income tax. These paragraphs describe dramatically the favored treatment given a few hundred favored citizens. The instructions state:

Line 11—JOBZ subtractions

Individuals who invest in or operate a qualified business in a Job Opportunity Building Zone (JOBZ) may be able to subtract certain types of income, to the extent that the income would otherwise be taxable.

Complete Schedule JOBZ, *JOBZ Tax Benefits*, if in 2005 you received:

- income for renting real or tangible personal property used by a qualified business located in a zone,
- income from operating a qualified business in a zone,
- gains from the sale or exchange or real or tangible personal property used by a qualified business located in a zone, or
- gains from the sale of an ownership interest in a qualified business.

(Exhibit 8). These two paragraphs, which thousands of taxpayers read before April 15 this year, shout inequality and non-uniformity in a tax--the personal income tax--that has never before had a geographic element and that has never before had an exemption that depended on whether government officials selected the person to receive the favor. The corporate income tax is similarly, through less dramatically, affected.

There is no other exemption -- or credit or deduction -- under the individual income tax law that requires a taxpayer to call on the local mayor in order to be approved as a beneficiary of that provision. One meets the terms of the income tax law or one does not. One qualifies for three deductions for children or one does not; the mayor has nothing to do with it. Mortgage interest expenses can be deducted under the same rules for everyone; the local city council has nothing to do with it. Deductions for charitable contributions do not depend on approval by the DEED Commissioner.

3. "A special law shall not be enacted."

Minnesota courts test compliance with the Special Legislation Clause under a very similar three-part test articulated in In re Tveten, 402 N.W.2d 551, 558-59 (Minn. 1987), citing Wichelman v. Messner, 250 Minn. 88, 119, 83 N.W.2d 800, 824 (1957):

> What constitutes a class or a proper basis of classification that will meet the constitutional prohibition against special legislation is determined by employing a three point "rational basis" test: The classification will be deemed constitutionally proper: [I]f (a) the classification applies to and embraces all who are similarly situated with respect to conditions or wants justifying appropriate legislation: (b) the distinctions are not manifestly arbitrary or fanciful but are genuine and substantial so as to provide a natural and reasonable basis justifying the distinction; and (c) there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide.

Two of the Special Legislation Clause prongs are identical to two prongs of the Miller Brewing test.

At the heart of a general law are standards that apply to everyone. Those standards are what make a law "general" rather than "special." The intent of the Special Legislation Clause of the Minnesota Constitution is to compel the legislature to pass general rules for the community-at-large rather than granting favors selectively. The section begins with this straightforward sentence: "In all cases when a general law can be made applicable, a special law shall not be enacted except as provided in section 2." Minn. Const. Art. XII, sec. 1. The sentence following this prohibition sets out a list of problematic special laws thought to be worthy of specific mention. These are the special laws the authors of this section of the Minnesota Constitution thought legislators might be especially tempted to enact. In the list is a prohibition on a special law "exempting property from taxation . . ."[10] Farther down in the clause is a prohibition on granting special privileges and immunities. The

---

[10] Only property is mentioned because the provision predates both income and sales taxes, which nevertheless fall within the purpose served by the mention of property taxes.

Program exemptions from and credits against sales and income taxes are privileges or immunities.[11]

If a law delegates to local officials and state bureaucrats power to exempt selected property from taxation, without setting out meaningful standards to control discretion, the Legislature is making those officials its agents to do what the Legislature is barred from doing directly--passing out tax exemptions one-by-one. The bottom line of the bar on special legislation is that persons similarly situated are to be treated similarly, and discriminatory taxation is specifically flagged as an area of special risk.

Meaningful standards are required to establish a basis for validly treating some persons differently from others. Imagine a legislative act that designated two John Deere dealerships as being tax-free. Imagine a legislative act exempting one Holiday Inn, one firm of architects or two ready-mix companies. That is the result of these Programs. Because the JOBZ and Bioscience Zone Programs are without meaningful standards, they are not general laws. They are, instead, authorization to state bureaucrats and local officials to pass out the discriminatory tax exemptions barred by the special law prohibition in Article XII, Section 1, of the Constitution.

The Programs' long-term tax exemptions plainly violate the Special Legislation Clause. They are therefore void *ab initio* and the tax benefits must be forfeited.

D. The Programs Violate Substantive Due Process.

The Due Process Clause includes "a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" County of

---

[11] "[T]he general rule deducible from all the authorities is that an exemption from taxation, belonging to a corporation, is a privilege altogether personal to the grantee, 'incapable of transference to another save by a specific enabling law' couched in explicit language apt to the purpose.'" State v. Chicago Great Western Ry.Co., 106 Minn. 290, 302, 119 N.W. 211, 213 (1908); Trustees of Pillsbury Academy v. State, 204 Minn. 365, 373-74, 376, 283 N.W. 727, 731-32 (1939).

Sacramento v. Lewis, 523 U.S. 833, 840 (1998). Here, the substantive due process question is whether the Minnesota Legislature could rationally have concluded that the Programs would further Minnesota's economic development.

The claim that long-term tax exemptions are crucial to a location decision is unverifiable. It is impossible to tell whether a subsidy or purely private benefit is being paid. Only if the business would not otherwise have located in the jurisdiction is there even arguably a public purpose to the subsidy. Because that cannot be verified, governmental oversight of the Program is meaningless, and the deals are irrational from the public's perspective.

The same or comparable economic activity often would take place without the exemptions, which makes the exemptions a waste of public funds for purely private benefit. Whether a tax exemption is the deciding factor is unknown and unknowable. Even if the absence of a tax exemption is decisive for a particular business, other businesses may well supply the need, and completely unrelated businesses, in the dynamic, ever changing economy, may well provide jobs in any event. The exemptions favor each beneficiary Minnesota business over its Minnesota competitors for no justifiable reason.

The Programs' clear and material private benefits overwhelm the highly speculative public benefit. Government gets nothing--no goods, no services, no equity in the businesses. Because a business that wishes to expand somewhere will do so, it gives up nothing by expanding in a designated Zone, making the alleged jobs for tax exemptions exchange an illusion. Plaintiffs do not diminish the significance of substantial investments being made, or deny that such investments can constitute consideration sufficient to support a contract (See, e.g., Reserve Mining Co. v. State, 310 N.W.2d 487, 494 (Minn. 1981)), but the crucial facts remain that the business and benefits from its

property and business operation and the state and local governments get no direct benefits in exchange for material economic detriments in the form of forgone taxes. Even if the jobs do materialize, that is no indication that the jobs would not have been provided by tax paying competitors, or that the people would not have had other, perhaps better, jobs, or migrated to a place where taxpaying businesses are providing jobs, thereby lessening the burden on government in the tax-free zone. Though dressed in the language of competition and obscured by a procedural maze, at bottom, these programs hand out private benefits without evidence of any public benefit that would not otherwise have occurred.

Simply providing private benefits is not a legitimate public purpose. Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) (invalidating on substantive due process grounds a statute that prohibited the sale of caskets by anyone other than a licensed funeral director because it clearly benefitted funeral directors and was not rationally related to any legitimate public purpose). Cf. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidating under the Commerce Clause a statute prohibiting the importation of most waste from outside the state on the ground it was a protectionist measure against which a "virtually *per se* rule of invalidity has been erected."); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (invalidating under the Contract Clause a statute affecting contractual relations regarding pensions of a few employers, and perhaps primarily one, on the ground that it was narrowly addressing the concerns of the affected employees, not meeting an important general social problem).

The local officials authorized to grant state tax exemptions have local, not state, interests in mind and have no foundation for making judgments affecting the state taxes paid by taxpayers all over the state. Both Programs foment competition among cities in Minnesota for business

expansions that would occur in Minnesota in any event. The September 2004 issue of JOB Newz, DEED's newsletter for the JOBZ Program, contained the following statement of DEED's views on the locations from which businesses may appropriately be enticed to locate in a JOBZ Zone:

> JOBZ Policy Prohibits "Poaching"
> While it is *always appropriate to encourage businesses located outside of a JOBZ area to expand on any parcel in the zone*, remember that communities are expressly prohibited from actively recruiting businesses from other JOBZ communities--a practice sometimes referred to as "poaching." It's not just DEED policy, but wise business practice to refrain from poaching.

(Stip. 86) (emphasis supplied). DEED obviously intends that JOBZ communities poach businesses from other Minnesota communities who are not in another JOBZ Zone, thereby diminishing the state's tax base.

The Programs provide phenomenal local authority to determine which businesses benefit. They also provide governors, executive branch officials and legislative leaders with phenomenal power or discretion to seek benefits for businesses they personally favor for whatever personal reasons, innocent or corrupt, that they may have.

IV.

CONCLUSION

Plaintiffs respectfully request that this Court uphold the Minnesota Constitution and United States Constitution by determining that granting of long-term tax exemptions in connection with business-location decisions by private contract is unconstitutional. Plaintiffs respectfully request that the relief include declaring each of the tax exemption contracts entered into under the Programs void *ab initio*, and ordering that the Commissioner of Revenue to seek repayment of any tax exemptions already realized. Finally, Plaintiffs request an award of reasonable attorney fees.

Dated: July11, 2006

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

BY 

John P. James, I.D. No. 49608
Stephen C. Rathke, I.D. No. 89771
Attorneys for Plaintiffs
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 339-8131
FAX: (612) 339-8064

Doc. #: 366830